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In the Supreme Court of the United States

OCTOBER TERM, 1957

BARTOLO LUBINI, PETITIONER,

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 17-18) is reported at 251 F. 2d 28. The memorandum opinion of the District Court (R. 35-37;[1] Pet. 18-21) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1958 (R. 47). A petition for a writ of certiorari was filed on April 8, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The pagination of the record in this Court which consists of the Joint Appendix below and other papers of record in this Court will be designated by the symbol "R."; references to the appendix of the appellee below will be designated by the symbol "App.".

QUESTION PRESENTED

Whether an alien who had in 1939 left the place of his birth which is presently part of Yugoslavia, had established a home in Trieste from 1939 to 1946, and had entered this country in 1946 as an Italian resident was eligible for adjustment under the Refugee Relief Act or under the Displaced Persons Act on the ground that he feared persecution in Yugoslavia when admittedly he can be deported to Italy as the country of his last residence.

STATUTES INVOLVED

Section 4 of the Displaced Persons Act of 1948, as amended (62 Stat. 1011, 64 Stat. 224; 66 Stat. 277, 50 U.S.C. App. 1953) provides:

> (a) Any alien who (1) entered the United States prior to April 30, 1949, and was on that date in the United States, or if he was temporarily absent from the United States on that date for the reasons which, in accordance with regulations to be promulgated by the Attorney General, show special circumstances justifying such absence, and (2) is otherwise admissible under the immigration laws, and (3) is a displaced person residing in the United States as defined in this section may, within two years next following the effective date of this Act, as amended, apply to the Attorney General for an adjustment of his immigration status. * * *
>
> (b) When used in this section the term "Displaced Person residing in the United States" means a person who establishes that he lawfully entered the United States as a non-immigrant under section 3 or as a non-quota immigrant student

> under subdivision (e) of Section 4 of the Immigration Act of May 26, 1924, as amended, and that he is a person displaced from the country of his birth, or nationality, or of his last residence as a result of events subsequent to the outbreak of World War II; and that he cannot return to any of such countries because of persecution or fear of persecution on account of race, religion or political opinions.

Section 6 of the Refugee Relief Act of 1953, as amended (67 Stat. 403, 68 Stat. 1044, 50 U.S.C. App. (Supp. V) 1971d) provides in pertinent part:

> Any alien who establishes that prior to July 1, 1953, he lawfully entered the United States as a bona fide nonimmigrant and that he is unable to return to the country of his birth, or nationality, or last residence because of persecution or fear of persecution on account of race, religion, or political opinion, or who was brought to the United States from other American republics for internment, may, not later than June 30, 1955, apply to the Attorney General of the United States for an adjustment of his immigration status. * * *

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals (R. 47) affirming the dismissal by the District Court for the District of Columbia of his complaint for declaratory and injunctive relief from orders entered in immigration proceedings denying him adjustment of his nonimmigrant status to that of a permanent resident pursuant to Section 4 of the Displaced Persons Act of 1948 (62 Stat. 1011, as amended, 50 U.S.C. App. 1953, *supra*) and under Section 6 of the Refugee

Relief Act of 1953 (67 Stat. 403, as amended, 50 U.S.C. App. (Supp. V) 1971, *supra*) (Pet. 18-21).

Petitioner was born in 1910 in Briani which was then a part of Austria but which, between World War I and World War II, became a part of Italy, and after 1947, a part of Yugoslavia (R. 40). In 1939, when Briani was still Italian, petitioner moved to Trieste and remained a resident of Trieste from 1939 to 1946, during all of which time Trieste was part of Italy (R. 40). During the war years petitioner was a sailor in the Italian Merchant Marine, traveling between all the ports of Italy (R. 40; App. 34, 39). In 1946 he spent a month in Briani on a visit, having been given a pass to go there from Trieste by Italian and Yugoslav authorities (App. 34). On October 23, 1946, petitioner arrived in the United States at Baltimore, Maryland, on an Italian ship and in possession of an Italian seaman's book. He deserted his ship and remained in this country illegally (R. 40-41; App. 35, 39-40). On February 10, 1947, pursuant to the Treaty of Peace with Italy, the city and territory of Trieste became a free territory (61 Stat. (pt. 2) 1247, 1380-1382).

A. The various proceedings before the Immigration and Naturalization Service may be summarized as follows:

1. Deportation proceedings were instituted against petitioner on October 4, 1951 (App. 17-18). At the hearing petitioner stated that he was last a citizen of Italy; that Trieste was his "permanent home" until 1946, when he came to the United States; that his wife and child are still living in Trieste; and that his wife's nationality is also Italian (App. 19, 24, 27, 38, 42). He stated that he had never been a citizen or subject of any

country other than Italy (App. 19). Petitioner offered no evidence tending to establish that he was not deportable, and he was, accordingly, ordered deported (App. 24-27). On January 5, 1952, the Board of Immigration Appeals granted a right of voluntary departure provided petitioner should depart within 60 days (App. 27-28). Petitioner did not depart and the deportation order was reinstated.

2. In August 1952, petitioner applied for adjustment of his nonimmigrant status to that of permanent resident under Section 4 of the Displaced Persons Act of 1948 (*supra*, pp. 2-3) which permits relief to "a person displaced from the country of his birth, or nationality, or of his last residence as a result of events subsequent to the outbreak of World War II" (*Ibid.*). At his hearing on August 5, 1952 (App. 28), petitioner testified that he had served in the Italian army for 24 months when he was 21, that he had been an Italian seaman, that he had come to the United States aboard an Italian vessel with Italian seaman's papers (App. 32, 34, 39). When asked of what country he was a citizen, petitioner replied (App. 33), "Not any country." He reiterated, however, that he had been living in Trieste from 1939 to 1946, had been married there, and that his child had been born there (App. 34). He testified that, although he made no official inquiry as to whether he would be able to return to Italy or Trieste, he did not think he could return to Trieste because his name had been cancelled on the population registry (App. 36-37). He also stated without explanation that (App. 37) "if I fall in the hands of the Yugoslavian Government I will be persecuted." He said he did not know what government was "ruling" Trieste "now" but he under-

stood that Yugoslavia claimed Trieste (App. 41).[2] He stated that the reason that he did not want to return to Briani, his birthplace, was that he did not like the Yugoslavian form of government (App. 37-38, 42). He admitted that, when he returned to Briani in 1946 for a month's visit, he was not persecuted (App. 38).

At the conclusion of this hearing, the hearing examiner found that petitioner was "a native of Austria and last a citizen of Italy"; that he "was last a resident of Trieste", and that he "cannot establish that he is unable to return to Trieste, because of fear of persecution on account of race, religion, or political opinions" (App. 44), and accordingly recommended denial of his application (App. 43, 45).

3. In December 1953, petitioner moved to reopen the deportation proceedings in order to apply for suspension of deportation under Section 244(a) of the Immigration and Nationality Act of 1952. On January 29,

[2] At the time of this hearing, the Free territory of Trieste was under the protection of the Security Council of the United Nations Organization as provided by the Italian Peace Treaty (see: 61 Stat. (pt. 2) 1247, 1429-1440 (Annex VI, Permanent Statute of the Free Territory of Trieste), 1440-1443 (Annex VII, Instrument for the Provisional Regime of the Free Territory of Trieste)), and was being administered by the allied forces. On October 5, 1954, a Memorandum of Understanding was entered into between the governments of Italy, the United Kingdom, the United States, and Yugoslavia, under which the military government would be terminated, and the two zones into which the Free Territory was divided would be civilly administered by Italy and Yugoslavia, respectively, with full guarantees of rights to both ethnic groups. See: "Memorandum of Understanding Between the Governments of Italy, the United Kingdom, the United States and Yugoslavia Regarding the Free Territory of Trieste", 5 United States Treaties and Other International Agreements (Part 3, 1954), pp. 2387-2389, and see Special Statute, entered into between Italy and Yugoslavia, *Ibid.*, pp. 2390-2393. The zone which includes the city of Trieste is within the area of Italian civil administration.

1954, this motion was denied by the Board of Immigration Appeals (App. 45, 46).

4. In March 1955, petitioner filed an application for adjustment of his status to that of permanent resident under Section 6 of the Refugee Relief Act of 1953 (*supra*) (App. 46). An examination was conducted on this new application by a special inquiry officer, who, after consideration, recommended its denial (App. 46-47). The special inquiry officer's report states that under date of March 18, 1954 the Consul General of Italy at New York advised the Immigration and Naturalization Service that it had been officially established that petitioner had established his residence in Trieste on May 19, 1940, "that as he was a permanent resident of Trieste on June 10, 1940, no option was required in his case", and that on April 2, 1954 the Consul General issued a travel document for petitioner's return to Italy (App. 47). The special inquiry officer recommended that petitioner's application for adjustment of status under the Refugee Relief Act of 1953 be denied (App. 47) "for the reason that he is able to return to the country of his nationality." On April 28, 1955, this recommendation was approved by the Regional Commissioner "upon consideration of the entire record" (R. 43).

B. On April 28, 1954 petitioner filed the complaint instituting the instant proceedings in the District Court for the District of Columbia alleging, *inter alia*, that he is a native of Yugoslavia, that he is a stateless person and not a citizen of Italy, that he was not last a resident of Trieste but that in any event Trieste is not a country within the meaning of the Displaced Persons Act. On argument in this action, petitioner's counsel conceded

that the claim of possible persecution would not apply if petitioner, in accordance with the deportation order, were deported to Italy (R. 24-26), and he also conceded that petitioner could legally be deported to Italy (R. 27). He took the position that petitioner was entitled to relief under the two statutes if he could show that he was displaced from either (1) his country of birth, or (2) his country of nationality or (3) his country of last residence. He also contended that, since Trieste is not a country, that free territory could not, under the findings of the Immigration and Naturalization Service in the proceedings under the Displaced Persons Act (*supra*, p. 6), be the place of his last residence within the meaning of the statute (R. 13-14).

In its memorandum opinion denying petitioner relief (R. 35-37), the district court held that, while Trieste was not a country within the terms of the statute, nevertheless, since the Immigration and Naturalization Service had found that petitioner is a citizen of Italy, he was not entitled to adjustment of status as a displaced person. The court construed Section 4 of the Displaced Persons Act (*supra*, pp. 2-3) to mean (R. 37) "that the alien is entitled to such relief only if he is unable to return either to the country of his birth, or to the country of his nationality, or to the country of his last residence because of fear of persecution", and observed that "[i]n this instance, he can return to the country of his nationality without fear of persecution."

In its opinion affirming the judgment of the district court, the Court of Appeals held as follows (Pet. 18):

> * * * a review of the record leads inescapably to the conclusion that appellant's last residence was

in Italy in the city of Trieste. Appellant's testimony in the deportation hearings in 1951 and in the hearing on his Displaced Persons Act application in 1952 establishes that he left his home in Briani in 1939, and that his permanent home between 1939 and 1946 was in Trieste; appellant's wife and child still live in Trieste. Accordingly, we think it plain that neither on his Displaced Persons Act application nor on his Refugee Relief Act application has appellant carried his burden of showing that he will be subject to persecution "on account of race, religion, or political opinion" in the country of his birth (Yugoslavia), and in the country of his nationality (undetermined), and in the country of his last residence (Italy).

ARGUMENT

In all the proceedings below, administrative and judicial, it was found as a fact that petitioner made his permanent home in Trieste between 1939 and 1946 at a time when Trieste indisputably was Italian. Hence, when petitioner came to the United States in 1946, he came from the country of Italy, just as he would have come from Italy had he left Rome or Naples. The holding of the Court of Appeals that the country of petitioner's last residence was Italy is thus not a ruling based upon facts not found by the administrative authorities. The Court of Appeals merely found it unnecessary to consider the validity of the legal conclusions as to petitioner's present nationality which had been drawn from the established facts since it properly found that it was enough that petitioner was not unable to return to the country of his last residence, Italy. And it was also unnecessary for the court to consider

the present status of Trieste since the country (not city) to which petitioner is to be returned is the *country* of his last residence, Italy.

For that reason the only question raised by petitioner which is really involved in this case is whether petitioner is entitled to adjustment of status if he can establish fear of persecution in any one of three places —(1) the country of his birth, (2) the country of his nationality or (3) the country of his last residence— even if he cannot establish a reasonable fear of persecution in the other two. Petitioner argues that he is entitled to consideration for relief if he would be persecuted in Briani, the place of his birth, which became part of Yugoslavia some seven years after he moved away in 1939, despite the fact that he is not threatened with deportation to that country. The statute is not reasonably subject to such an interpretation.

As the Court of Appeals for the Ninth Circuit recently said in *Cheng Lee King* v. *Carnahan*, No. 15,415, decided March 24, 1958, slip opinion, p. 3:

> Literally the key words "unable to return to the country of his birth, or nationality, or last residence" are in the disjunctive. Literally King is entitled to relief if he can't go back because of fear of persecution on account of political opinion to the country of his birth or to the country of his nationality or to the country of his last residence.
>
> When the Congress was passing the act it was in a beneficent mood, but we cannot attribute to the Congress a construction, a meaning so broad as the literal. One must doubt that the Congress was in that beneficent a mood. The immigration service has interpreted the phrase in the conjunc-

tive. It holds that if the alien has two or three countries on his record of birth, nationality and last residence, then before he can establish the basis for change of status in the United States, he must be unable to return to any of the countries because of fear of persecution. Substantially the service is right.[3]

The Congressional purpose was to clarify the ambiguous status of those persons who were truly displaced persons and refugees. Congress could not have intended to extend relief to those whose place of birth was in some totalitarian country, but who had emigrated therefrom many years before and had established homes in other countries to which they could be returned with impunity. The political situation in the place of birth, as in the case at bar, has no relevance to the issue of whether the alien would be threatened with persecution if the order of deportation returning him to the country of his last residence were executed. His status in a country to which he does not intend, and is not being compelled, to return is a completely academic consideration.

That the congressional intent both in respect to Section 4 of the Displaced Persons Act, and Section 6 of the Refugee Relief Act was to afford relief to those whose sole ties were to countries to which they could return only at the risk of persecution, was evidenced

[3] The court there held that since that Chinese alien could not be returned to the country of his last residence, Singapore, for other reasons, the fact that he would not be persecuted in Singapore did not render him ineligible for relief as a person fearing persecution in China. Here petitioner can be returned to Italy where admittedly he does not fear persecution.

most recently when, during the second session of the 83d Congress, a bill (H.R. 8193) to amend the Refugee Relief Act was proposed. In pertinent part it would have required the alien to show inability "to return to the country of his birth, nationality, *and* last residence" (emphasis added). While this bill passed the House in this form, the original language of Section 6 was restored by the Senate and was ultimately adopted by Congress in the 1954 amendment to Section 6 (see Public Law No. 751, 83d Congress, 2d Session, 68 Stat. 1044). The Senate Report on the bill explains the rejection as follows (S. Rep. No. 2045, 83d Cong., 2d Sess., p. 5):

> The bill would amend section 6 of the Refugee Relief Act of 1953 relating to the adjustment of aliens in this country in a refugee status who are unable to return to the country of their birth, or nationality, or last residence, because of persecution or fear of persecution on acount of race, religion, or political opinion. . . . The committee has restored the language "birth, or nationality, or last residence," which is the language presently contained in section 6 of the Refugee Relief Act of 1953. The committee understands that this language has been construed by the Immigration and Naturalization Service to mean that if the applicant for adjustment is able *to return to any such country* without persecution or fear of persecution, he is not eligible for adjustment. Since the existing language, as construed, correctly expresses the intent of the section no purpose would be served by modifying the language as proposed in the bill. [Emphasis added.]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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